THE SHERMAN LAW

AND THE

NEW ENGLAND RAILROADS

A SPEECH

BY

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AUTHOR

OF

THE HISTORY

OF

THE SHERMAN LAW

PREFACE.

The Committee on Rules of the House of Representatives of the United States, on December 10 and 11, 1912, sat to hear statements and arguments for and against House Resolution No. 718, which had been introduced by Mr. O'Shaunessy of Rhode Island. That resolution, if recommended by the Committee on Rules, and adopted by the House of Representatives, will cause a Congressional investigation of the relations in New England between the New York, New Haven & Hartford Railroad Company and the Boston & Maine Railroad Company, and the Grand Trunk Railroad Company of Canada. On the evening of the last day of the hearing, after many gentlemen from the New England States had addressed the Committee, the chairman, Mr. Henry of Texas, requested Mr. Albert H. Walker, as the author of the History of the Sherman Law, to supplement the discussion by a statement of his views of the law which was applicable to the facts which had been presented to the Committee, in the form of testimony and other evidence. Thereupon, Mr. Walker made the speech which is printed on the following pages, and which pages are copies of pages 178 and 183 inclusive, of the officially printed report of the Hearings before the Committee on Rules.

Park Row Building,
Manhattan, New York,
January 13, 1913.

A. H. W.

STATEMENT OF ALBERT H. WALKER OF NEW YORK.

Mr. Chairman and gentlemen of the committee, I appear before you at the request of the chairman. I do not represent any client who has any interest in the New York, New Haven & Hartford Railroad Co., or in any other corporation which has been mentioned here to-day. I occupy the position of a jurist, and writer on questions in the interstate-commerce law and the Sherman law, to make such suggestions as have occurred to me relevant to the application of those laws to the facts which have been presented to the committee; and afterward to answer whatever questions may be put to me by the committee on any of these topics.

I have heard all that has been said during this inquiry, and I understand that the question before the committee is whether it shall recommend the House to appoint a special committee to make an investigation into certain points of fact.

The House has jurisdiction to investigate matters only where it has jurisdiction to take action in pursuance of whatever facts it may ascertain. That action may take the form of legislation, or it may take the form of impeachment of unfaithful executive officers. And without suggesting at this moment that there is any occasion to exercise this last jurisdiction, it is plain that whenever anything is brought to the attention of Congress which is worthy of consideration, and which lays the foundation for a suspicion that there might be some propriety in impeachment proceedings, Congress has jurisdiction to at least investigate the charges.

In order to apply the facts which have been developed in this hearing to the legal problems involved, it will be necessary for me to make a brief statement of some portion of the development of the jurisprudence which passes under the name of the Sherman law. The Sher-

man law was enacted by Congress in 1890, and I will read at this moment sections 1 and 2 of that act, which are very brief, and which are all that need to be read in order to explain the relation of that statute to the facts before the committee.

Section 1 of the Sherman law reads as follows:

Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations is hereby declared to be illegal. Every person who shall make any such contract, or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars or by imprisonment not exceeding one year, or by both of said punishments in the discretion of the court.

The improper thing which is prohibited by this section is therein defined as combination in restraint of trade. This section does not prohibit restraint of trade which may be perpetrated by one corporation or man.

Section 2 is as follows:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor; and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both of said punishments in the discretion of the court.

Shortly after the beginning of the administration of President Roosevelt, he directed his Attorney General to bring an action against the Northern Securities Co., the Great Northern Railway Co., and the Northern Pacific Railway Co., for violation of the first section of

the Sherman law. The theory upon which that action was based was this, namely: A new corporation, the Northern Securities Co., was organized in the State of New Jersey, and that corporation purchased all the stock of the Great Northern Railway Co., and all the stock of the Northern Pacific Railway Co., with the view of running the two railroads as one system. That suit reached the Supreme Court of the United States, and in 1904 that court decided, by a vote of five judges to four, that that was an illegal combination, because it violated section 1 of the Sherman law. Four justices dissented from that decision. The dissenters were Chief Justice Fuller, Justice White, who is now Chief Justice, Justice Peckham, and Justice Holmes. Those justices dissented from the opinion of the Court on their view that a violation of the Sherman law does not result from a mere combination of two theretofore competing corporations, and that such violation does not occur until some overt act is committed in pursuance of such a combination and which overt act results in restraint of trade. And in the view of Justice White and the three other dissenting justices, such overt acts had not yet been committed in the Northern Securities case, and therefore the Sherman law had not been violated.

But the opinion of the court was delivered by Associate Justice Harlan, and he took the ground that the acquirement of combined power to restrain trade violates the Sherman law, because it constitutes a combination which potentially will operate to restrain trade. Three judges of the Supreme Court agreed with Justice Harlan in all respects. Justice Brewer did not agree with the proposition that the mere acquirement of the power to violate the Sherman law constitutes a violation thereof, but he did agree that the Sherman law had been violated in that case. So that combination was dissolved by a vote of five justices against four.

That is the law that was established in that litigation. Afterward the question arose as to whether the purchase by one corporation of the controlling stocks of a competing corporation constituted a violation of the Sherman law. In support of the affirmative of that proposition the decision of Justice Harlan could be cited. In support of the negative the dissenting views of Justice White could be cited.

That was the state of the law at the time that the United States Steel Corporation desired to acquire the ownership of the Tennessee Iron & Coal Co. When they acquired that desire they were afraid that the executive department of the Government might differ from their views. They held that the mere acquirement of the stock of the Tennessee Iron & Coal Co. would not violate the Sherman law, for they might use it to promote trade rather than to restrain it. In that view of the case they presented to President Roosevelt the question as to whether or not he had any objections, as the executive department of the Government, to the purchase of that stock. I know the view that President Roosevelt took of that matter as a result of personal correspondence between himself and myself upon that precise point, and the view he took of it was rather well founded upon the Northern Securities case.

The view he took of it was that the acquirement of the stock of the Tennessee Iron & Coal Co. did not violate the Sherman law, although the ownership of that stock might afterward be used to violate that law; and therefore when he said to the gentleman who represented the United States Steel Corporation, that he saw no objection to their purchase of that stock, he was substantially saying to them: "So far as I know, you may use this stock after you have acquired it, to promote trade; but if you do use it to restrain trade, then you

will be violating the law.'' It was in pursuance of that view of the Sherman law, which view was originally based upon the opinion of Justice White, in the Northern Securities case, that President Roosevelt, as I understand it——

Mr. HARDWICK. If you will pardon me just a moment. I will say that that very opinion which you refer to had been denounced in round terms by President Roosevelt all through this country.

Mr. WALKER. To which opinion are you referring?

Mr. HARDWICK. The original opinion in the Northern Securities case.

Mr. WALKER. I am unable to say that. I am pretty well acquainted with the history of the matter; but I am not able to agree with you upon that point. You know some facts, probably, that I do not know.

Mr. HARDWICK. I thought that was true.

Mr. WALKER. You could not prove it by me. [Laughter.]

It was in pursuance of that view of the Sherman law, as I understand it, that President Roosevelt acquiesced in the purchase by the New York, New Haven & Hartford Railroad Co. of those competing steamboat lines.

Mr. HARDWICK. I do not want to have a joint political debate with the gentleman, but I am willing to if he wants to put it on that ground. I thought he was discussing a question of law. I think the President's action in that matter was based on entirely different motives from that.

Mr. WALKER. I am not inquiring into his motives.

Mr. HARDWICK. I think you are. You are trying to make a defense of him, right here, about this matter.

Mr. WALKER. I am trying to explain to the committee what I know about the development of the Sherman law, but I am not agreeing with President Roosevelt. I do not agree with his views on the Sherman law. I will tell you that now.

Mr. HARDWICK. You do not.

Mr. WALKER. I do not.

Mr. HARDWICK. Where did you get the idea that that was the reason why he gave that Tennessee Coal & Iron Co. opinion?

Mr. WALKER. Because he wrote so to me personally, and I have the letter.

Mr. HARDWICK. That has never been published, has it?

Mr. WALKER. Certainly not.

Mr. HARDWICK. When did he make that explanation of his conduct in that matter?

Mr. WALKER. He wrote that letter to me about two years ago, since he came back from Africa.

Mr. HARDWICK. I am much obliged to you. Now I have what I want.

Mr. WALKER. Gentlemen, you will see the strict relevancy to my discussion of all I am saying. I am not trying to insert any remarks in the interest of any particular gentleman. I am trying to explain to you the development of the Sherman law in executive and judicial proceedings. In 1908—and I must beg the committee to listen to this——

MR. HARDWICK. I beg your pardon; but to correct the statement I made. I said that President Roosevelt had denounced certain decisions of the Supreme Court. The cases I had in mind—I want to say this in justice to myself as well as to you—were the Trans-Missouri and the Joint Traffic cases, which preceded the Northern Securities case.

Mr. WALKER. In 1908 President Roosevelt brought two new suits under the Sherman law, one against the New York, New Haven & Hartford Railroad Co. for having acquired the Boston & Maine railroad, and one against the Union Pacific Railroad Co. for having acquired the control of the Southern Pacific.

The CHAIRMAN. Mr. Walker, what the committee wished to get at from you was this point: whether the Sherman law in its operation could reach conspiracies against trade entered into between a corporation in this country, and one in England or Canada.

Mr. WALKER. I am leading directly up to it, and I shall reach that point in not more than five minutes. President Roosevelt brought suit against the Union Pacific and Southern Pacific for an illegal combination; and almost at the same time he brought suit against the New York, New Haven & Hartford and the Boston & Maine railroads for illegal combination; and those suits were pending at the end of his administration.

Near the beginning of the administration of President Taft, he became persuaded, as did his Attorney General, Mr. Wickersham, that the facts of the case in New England as between the Boston & Maine and the New York, New Haven & Hartford Railroad Cos. did not constitute any restraint of trade under the Sherman law. And in pursuance of that persuasion he directed the Attorney General to withdraw, and the Attorney General did withdraw that suit. About the same time the Union Pacific people applied to President Taft to withdraw the Union Pacific suit, and those applications were based upon the same theory—and it was a plausible theory, too—namely, that the competition that existed between the Union Pacific and the Southern Pacific was negligible and incidental and not essential, and that the competition between the New York, New Haven & Hartford and the Boston & Albany was incidental and not essential. Afterwards in the case of the Union Pacific road, two years after the New Haven case was withdrawn, the United States Circuit Judges, for Utah, four in number, decided that that view was the correct view, and that the competition between the Union Pacific and

Southern Pacific was incidental, and therefore its suppression was non-violative of the law. If that view of the law had been applied to the New York, New Haven & Hartford combination, perhaps the same result would have been reached. And it was on account of that view of the law, that the New York, New Haven & Hartford suit was withdrawn.

But a week ago last Monday, I was in the Supreme Court chamber when the Supreme Court reversed the decision of the court below in the Union Pacific case; and held that the competition proved in that case, however small it might be in proportion to the magnitude of the entire business of the two roads, was of such a character that its suppression constituted a violation of the Sherman law, and therefore that the two corporations must be divorced.

Now I come to one exact point involved here. The moment that decision is applied to the New York, New Haven & Hartford consolidation with the Boston & Maine Railroad, the same conclusion must be reached, and the view Mr. Buckland intimated, that that consolidation was an innocent one, ought to be revised by him in the light of the Union Pacific decision. With a thorough acquaintance of the facts of the two cases, and with a thorough acquaintance with the law, I wish to express to this committee my opinion that the moment the decision of the Supreme Court of the United States in the Union Pacific Co. case is applied to the New York, New Haven & Hartford and Boston & Maine consolidation, the same result will have to be reached, and those two corporations must be divorced. How is that result to be reached? There is no occasion for Congress to pass any new law to accomplish that result. It can be reached under the Sherman law, just as well as the Union Pacific divorce was reached under the Sherman law. And the circumstance

that Attorney General Wickersham withdrew that suit is no obstacle to bringing a new suit for the same purpose, and pressing it forward under the view of the law which is now well established in the Union Pacific case. Therefore there is no occasion, for Congress to do anything towards promoting the divorce of the New York, New Haven & Hartford Co. and the Boston & Maine Railroad Co.

In respect of the facts which have been brought before the committee, and complained of, by the gentlemen who represent Providence and Boston, relevant to the building or not building of the Southern New England Railroad by the Grand Trunk Railroad Co., I wish to make some observations which have not been made before.

It appears to me that the cessation of the building by the Grand Trunk Railroad Co. in Massachusetts and in Rhode Island has not been due (or at least it is unprovable that it has been due) to any combination between that corporation and the New York, New Haven & Hartford Railroad Co. I think that if this committee investigates that question it will find that the New York, New Haven & Hartford Railroad Co. ardently desires that the Grand Trunk Railroad Co. shall not build those railroads, and in order to promote that desire, the New Haven company is proposing to the Grand Trunk Railroad Co. a joint contract which shall be so favorable to the Grand Trunk Co. that it will not need or desire to build the New England extensions. If that turns out to be so, what can Congress do about it? Congress can do this about it, and nobody can do about it, what I am about to suggest, without new legislation.

I hold this view: On the assumption of the truth and accuracy of the statements which have been made by the gentlemen here, the Grand Trunk Railroad Co. is being tempted to work a fraud on the State of Massachusetts

and on the State of Rhode Island. The Grand Trunk Railroad Co. has fairly made a contract with those States; which contract provides that, under certain considerations, performed by the two States, the Grand Trunk Railroad Co. will build a railroad from Palmer to Providence, and one from Woonsocket to Worcester, and one from Woonsocket to Boston.

Now, if the Grand Trunk Railroad Co. fails to do that, if it repudiates its fair contract, then I hold that Congress has power to enact a statute to prevent the Grand Trunk Railroad Co. from doing any business anywhere in the United States until it does perform that contract. Congress can do that, in pursuance of its power to regulate commerce among the several States and with foreign nations. I think it is perfectly undeniable that Congress has power to enact a statute, in general terms, but applicable to these facts, which would operate to say to the Grand Trunk Railroad Co.: "You must carry out your contract with Massachusetts and Rhode Island; for if you do not do it, you will not be permitted to do any railroad business in Maine, Massachusetts, Vermont, New Hampshire, or anywhere else in the United States."

Mr. GARRETT. Mr. Walker, will you pardon me there a moment?

Mr. WALKER. Yes, sir.

Mr. GARRETT. The corporate name of this concern is the Southern New England, and not the Grand Trunk Railroad Co.

Mr. WALKER. I know that. I deem that immaterial; because it is the Grand Trunk Railroad Co. which has made its promise to the two States. The Grand Trunk Railroad Co. can perform that promise through the Southern New England Railroad Co. or by any other instrumentality; but the Grand Trunk Railroad is bound in ethics and bound in morality to perform its contract with the State of Massachusetts and with the State of

Rhode Island. It is competent for Congress if Congress, in its wisdom, sees fit to exercise that power, to enact a statute which shall make it obligatory upon the Grand Trunk Railroad to perform that contract, upon penalty of being excluded from the United States altogether.

Mr. GARRETT. Because it is a foreign corporation.

Mr. WALKER. That is right. Under the power to regulate commerce between the several States and with foreign nations I have not the slightest doubt that Congress has that power. Now, if Congress has that power it can exercise it, and I know of no way—and I have studied the matter very carefully since I have attended these hearings yesterday and to-day—I know of no way short of that, or other than that, by means of which the wrong can be stopped, which the Grand Trunk Railway Co. is seeking to perpetrate upon Massachusetts and Rhode Island. That wrong can not be stopped by any action of either of those States, because it relates to international commerce and to interstate commerce. I do not believe that it is possible for our friends from Massachusetts and Rhode Island to secure any redress for the wrongs of which they have complained to this committee; unless Congress will enact such a statute as I suggest.

The CHAIRMAN. Mr. Walker, I find that some members of the committee have imperative engagements, and they have just suggested to me that if you would file some additional views, the committee would be much obliged, but we have to take a recess now on account of these imperative engagements.

Mr. WALKER. This is a very suitable end to my remarks; because my sugestion of remedy—and the only remedy that I know of, for the wrongs complained of—is the principal thing I had to lay before the committee.

The CHAIRMAN. I agree with you, and think you are correct about that.

Thereupon the committee adjourned.